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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 24

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,
Petitioner,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee Under Indenture Dated the 21st Day of March 1928, Between Charles L. Cobb and The Chase National Bank of the City of New York, *et al.*

BRIEF FOR RESPONDENT ARTHUR J. O'LEARY, GUARDIAN AD LITEM FOR INFANT RESPONDENTS HANS ULRICH SCHWARZBURGER, ELIZABETH SCHWARZBURGER, HANS ADOLPH ROTH, HEIDE ROTH, CHRISTEL ROTH, EIKE ROTH, UWE ROTH, ECKARD ROTH, HANS EBERHARD SCHWARZBURGER, SABINE SCHWARZBURGER, BERND VOM BAUR CHRISTOPH ROTT, TILO KOSTER AND SITTA KOSTER

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Question Presented

The sole question presented by the Attorney General on this appeal is the following:

Whether this Court, in its decisions in *Brownell* v. *Singer*, 347 U. S. 403 and *Zittman* v. *McGrath*, 341 U. S.

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471, has so construed the Trading with the Enemy Act, 50 U. S. C. App. secs. 1, *et seq.*, as to require the New York Supreme Court, in an accounting proceeding brought at the request of the Attorney General (R. 18, 23), to oust itself of jurisdiction of a continuing *inter vivos* trust (R. 160), which is being administered under its supervision by a New York bank as trustee (R. 70), by directing said trustee to transfer to the Attorney General, as successor to the Alien Property Custodian, the accumulated income and corpus of said trust pursuant to an alleged amended vesting order which was filed with the Federal Register on April 9, 1953 (R. 64), a date 18 months after formal termination of the war with Germany (65 Stat. 451; Proclamation 2950, 50 U. S. C. A. App. p. xx), where the following circumstances clearly exist:

(a) that the trust was created on March 21, 1928, long before any freezing or vesting order was made (R. 21);

(b) that one of the remaindermen of the trust is a United States citizen by birth (R. 159, Pl. Ex. 10, R. 253, 186), who was in being prior to the time the alleged amended vesting order was made (R. 159);

(c) that all the remainder interests in the trust are contingent (R. 160) and it cannot be determined at this time to whom the trust fund will be ultimately payable (R. 160).

(d) that the remedy provided by Section 9 of the Act is illusory and inadequate in the instant case (this brief, pp. 10-11);

(e) that there has been a prior judicial proceeding relating to this trust in the New York Supreme Court in which the Attorney General intervened and in which judgment was entered to the effect that said Attorney General is not entitled to the income of said trust and had no authority to exercise the fiduciary powers reserved to Bruno Reinicke, Jr., but that the trustee bank had au-

thority to exercise such fiduciary powers (Pl. Ex. 3, R. 211-223, 183-184; Pl. Ex. 4, R. 229, 184; Pl. Ex. 5, R. 231, 184).

It is respectfully submitted that this Court has not so construed said Act either in the cited decisions or in any other decision.

The Facts

The subject matter of this action is an *inter vivos* trust set up by an indenture dated March 21, 1928, made between Charles L. Cobb as Settlor and The Chase National Bank of New York as Trustee. Although he was named as Settlor, it was determined in a prior action that Charles L. Cobb was not the real creator of the trust but that the actual settlor was Bruno Reinicke.

The trust was created primarily for the benefit of the children of the settlor. The trust agreement (R. 21-53) was made in Chicago, Illinois, on March 21, 1928 and under its terms the trust corpus was granted, conveyed, assigned, transferred, quitclaimed and delivered to The Chase National Bank of the City of New York (R. 21) for the benefit "of the children of Bruno Reinicke, Jr. and Elisabeth Reinicke, his wife, that is to say, Bruno Carl Reinicke and Robert Hans Reinicke and any other children that may hereafter be born * * *" (R. 21). The trustee is directed "to add the net income to the principal of the trust estate unless Bruno Reinicke, Jr. shall * * * direct the trustee to pay the said net income, or some part thereof, to any one or all of his children or to Bruno Reinicke, Jr...or any other person or persons * * *" (R. 22-23).

From the provisions just referred to, it becomes unmistakably clear that title to the corpus is in a trustee. The trustee has complete ownership. The alien interests, that is to say, the unvested interests of alien persons are

contingent. The trustee is to hold the title and ownership: until the death of the survivor of the settlor and his wife; thereupon the principal is to be divided into as many equal shares as there are then children of the settlor surviving, with a provision for children of the settlor who have previously died leaving a descendant or descendants then living (R. 24). The shares in trust for the living children are to be held until the beneficiaries arrive at certain ages when the principal is to be distributed. The children have vested interests subject to being divested and in that sense what they actually have are contingent remainders. If there are no surviving children or descendants of children then provision is made for the distribution of the principal to nephews and nieces and their descendants. The infants I represent are descendants of the nephews and nieces and they have contingent remainders in the entire fund.

Since all the right, title and interest of Bruno Reinicke, Jr., were vested by the Custodian on or about January 29, 1945 (R. 247-251) and since it has been judicially determined that said Bruno Reinicke Jr., could not exercise the powers over the trust given by the indenture to the settlor (R. 221), it is difficult to understand why petitioner has devoted nearly one and a half pages of his brief (pp. 3-4, 24) to detailing such powers. However, it is a fair inference that the purpose of such detail is to create the impression, which is contrary to the fact, that such powers are being actively exercised by an enemy alien.

Summary of Argument

(1) The action of the New York Courts in this case is in harmony with the Trading with the Enemy Act and is not in conflict with the rule in *Brownell* v. *Singer*, 347 U. S. 403, nor with the rule in *Zittman* v. *McGrath*, 341 U. S. 471 because neither of those cases is controlling.

Both of those cases involve money owned by enemy aliens. In our case a New York Trustee under a 1928 trust indenture has ownership and possession and the enemy aliens have contingent remainder interests which cannot ripen into ownership or the right to possession except upon the happening of future events. Since the Alien Property Custodian stands in the shoes of these aliens, he cannot acquire anything more than the aliens have and consequently New York Courts have properly refused to adjudicate the destruction of the trust.

(2) The judgment in the prior action (*Chase National Bank* v. *McGrath*, 301 New York 602) is *res adjudicata*. The judgment in the prior action would be nullified if the Trustee is ordered in this action to turn over the entire fund to the Attorney General.

POINT I

The action of the New York Courts is in harmony with the Statute and does not conflict with the decisions of this Court in *Brownell* v. *Singer* and *Zittman* v. *McGrath*.

The action of the New York Courts in this case is in harmony with the Trading with the Enemy Act and is not in conflict with the rule in *Brownell* v. *Singer*, 347 U. S. 403, nor with the rule in *Zittman* v. *McGrath*, 341 U. S. 471. Neither of these two cited cases upon which the petitioner relies is applicable here.

The instant case must be distinguished from *Brownell* v. *Singer, supra*, and *Zittman* v. *McGrath, supra*, because of important, relevant, essential and outstanding differences. We are not dealing here with enemy owned property; we are dealing with property owned since 1928 by a New York Trust Company, which is held on *inter vivos* trust for the benefit of at least one American citizen,

which is in the process of administration under judicial supervision and which is not "payable or deliverable to, or claimed by a designated enemy country or national thereof" (Ex. Ord. 9193 as amended, 7 F. R. 5205, 10 F. R. 6917). In the *Singer* case the Custodian vested "the excess proceeds of the liquidation remaining after the payment of creditors" from funds that had been on deposit in an agency of an enemy alien bank, 347 U. S. 403, 405. The Courts of New York adjudged that Singer had a preferred claim on those funds the payment of which was conditional upon Singer obtaining a license from Federal Authorities. (*Singer* v. *Yokohama Specie Bank*, 299 N. Y. 113, affirmed *sub nom. Lyon* v. *Singer*, 339 U. S. 841, 94 Law ed. 1323.) But the Alien Property Custodian denied a license to Singer and served a directive that the Superintendent of Banks of New York turn over to him the $557,561.25 that had been allocated and set aside out of the enemy alien's funds as a reserve for the payment of Singer's prefered claim. The New York Superintendent of Banks applied at Special Term of the Supreme Court for an order authorizing him to turn over the funds to the Alien Property Custodian. That application was denied. Special Term held that while the funds could not be paid to Singer, who had been denied a license, neither should the funds be paid over to the Alien Property Custodian. It was held that this allocated fund for payment of a preferred claim did not constitute "excess proceeds" of the Yokohama Specie Bank and were not encompassed by the Vesting Order of 1943 whereby the Custodian had vested "excess proceeds"—that is proceeds over and above the amounts of approved and allowed claims. Special Term also observed that *Lyon* v. *Singer*, 339 U. S. 841, which affirmed a judgment adjudicating that Singer had a preferred claim, with payment conditioned upon obtaining a license, does not mean that a license may be arbitrarily withheld. (*In re Yokohama Specie Bank*, 200 Misc. 610; affirmed

no opinion, 280 App. Div. 970; affirmed no opinion, 305 N. Y. 908.) On appeal by the Attorney General to the Supreme Court of the United States, the judgment of the New York Courts was reversed with a *per curiam* opinion, reading:

> "Reversed. *Zittman* v. *McGrath*, 341 U. S. 471, 95 Law ed. 1112, 71 S. Ct. 846." (*Brownell* v. *Singer*, 347 U. S. 403, 98 Law ed. 803.)

There is a dissenting opinion by Mr. Justice Jackson with whom Mr. Justice Frankfurter and Justice Douglas join.

What was decided and all that was there decided is that the Custodian was entitled to the possession of all the funds in the hands of an agency of an enemy alien even though a creditor had a prefered claim against those funds. That decision has no application to this case which does not involve funds on deposit with an agency of an enemy alien and has nothing to do with creditors or preferred claims.

We turn now to *Zittman* v. *McGrath*, 341 U. S. 471, 95 Law ed. 1112. There the petitioners had levied an attachment against the accounts of the Deutsche Reichsbank with the Federal Reserve Bank of New York and thereafter obtained default judgments against the Reichsbank but the judgments remained unsatisfied because of the freezing program. The Alien Property Custodian issued a Vesting Order whereby he vested in himself the "right, title and interest" of the German banks and also served on the Federal Reserve Bank a "turnover directive" describing the specific property which he required to be turned over to him "to be held administered and accounted for as provided by law." As Justice Jackson stated, 341 U. S. 471 at 473, the Custodian in the relief asked for "omits any request for a declaration that the attachments are invalid. He asks a decree only that Cus-